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Couch v. United States: The Supreme Court Takes a Fresh Look at the Attorney-Client Privilege--Or Does It?

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COUCH V. UNITED STATES: THE SUPREME COURT TAKES
A FRESH LOOK AT THE ATTORNEY-CLIENT PRIVILEGE—
OR DOES IT?

Introduction

Should communication between accountants or attorneys acting as accountants and their clients be deemed privileged? There has been a great amount of disagreement as to how this question should be answered.¹ In seeking an answer it will be useful to examine the present standing of the accountant-client privilege, and to attempt to predict the future development of the privilege in the light of *Couch v. United States*.² In that case, Lillian Couch, the owner of a small business and subject of an audit by the Internal Revenue Service, was in the practice of keeping her records and books in the office of her accountant. An agent of the Internal Revenue Service went to the accountant's office and inspected those books and records, which indicated to the agent that there had been an understatement of gross income. He called in a special agent who conducted further investigation and attempted to talk to Mrs. Couch's accountant, but the accountant refused to see him. The special agent then had a summons issued to secure Mrs. Couch's records from her accountant.³ In an attempt to avoid delivery of the records to the Internal Revenue Service, the accountant subsequently delivered the records to Mrs.

¹ See generally 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (McNaughton ed. 1961) [hereinafter cited as WIGMORE]; J. CAREY & W. DOHERTY, ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION 134 (1966).

² 409 U.S. 322 (1973).

³ The summons was issued pursuant to INT. REV. CODE of 1954, § 7602, which reads as follows:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Couch's attorney. Even though the records were in the hands of the attorney, the district court granted the special agent's petition to enforce the summons.⁴ The court of appeals affirmed,⁵ as did the Supreme Court.⁶

To place *Couch* in proper perspective it is necessary to note several relevant facts. The state of Virginia, where Mrs. Couch lived, does not have a statute which provides for an accountant-client privilege.⁷ The accountant was not an employee of Mrs. Couch, but an independent contractor who maintained a separate office and performed services for other people as well.⁸ Moreover, the accountant was in possession of the records when the summons was served.⁹ Thus it is clear that *Couch* only addresses itself to the accountant-client privilege in a limited context. *Couch* holds that the fifth amendment right not to incriminate oneself through the production of personal records extends only to a person who is himself in possession of such records.¹⁰ *Couch* reaffirms that there is a "private enclave" wherein one has a right to privacy, but that right was deemed to have been waived under the circumstances in *Couch*.¹¹

To understand the accountant-client privilege, one must look more deeply into the privilege and its background than did the Court in *Couch*. The Court dealt with the accountant-client privilege only in the context of the Constitutional right to privacy and the right not to incriminate oneself.¹² It is also important to consider relevant statutes and what, if anything, an attorney or an accountant may do to preserve the privilege.¹³

An understanding of the accountant-client privilege is important to attorneys in two ways. An attorney may be called upon to defend a client who desires to invoke the privilege or he may, himself, choose

⁴ The opinion of the United States District Court for the Western District of Virginia is not reported.

⁵ *Couch v. United States*, 449 F.2d 141 (4th Cir. 1971).

⁶ *Couch v. United States*, 409 U.S. 322 (1973).

⁷ *Id.* at 327. The relevance of a state statute creating an accountant-client privilege is discussed in the text accompanying notes 39-65 *infra*.

⁸ *Id.* at 324.

⁹ *Id.* at 329.

¹⁰ *Id.* The majority opinion quotes from *Johnson v. United States*, 228 U.S. 457, 458 (1913), that "a party is privileged from producing the evidence, but not from its production." The Court in *Couch* goes on to justify limiting *Boyd v. United States*, 116 U.S. 615 (1886), which allowed a person in possession of documents to treat them as privileged. That is, the majority in *Couch* limits the broad language in *Boyd* to require possession. Thus *Couch* makes possession of a document the most important factor.

¹¹ 409 U.S. at 335-36. See also *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964).

¹² See text accompanying notes 22-38 *infra*.

¹³ See text accompanying notes 39-65 *infra*.

not to produce records of an accounting nature that he has kept for a client. Depending on the situation, an attorney might argue in the first case that there should be an accountant-client privilege analogous to the attorney-client privilege, or in the latter situation that the client should be able to invoke the attorney-client privilege even though the attorney was acting in this instance as an accountant. It is therefore helpful first to consider why courts will allow information a client has conveyed to his attorney to remain confidential.

The attorney-client privilege had its origin in Roman law,¹⁴ and was given common law recognition in the early eighteenth century.¹⁵ Originally the reason for the attorney-client privilege was a policy of honor among attorneys,¹⁶ but a more important reason developed—that of assuring the fullest possible benefit from the relationship between attorney and client.¹⁷ While the attorney-client privilege was evolving, the role of the accountant was limited because of a simplistic approach to taxes and accounting.¹⁸ Even though the role of the accountant eventually became more significant because of increased record-keeping requirements and because the advisory duties of accountants became similar to those of attorneys, a rule of privilege regarding accountant-client communication did not develop in the common law.¹⁹ This lack of development is attributable in part to an interest in limiting the creation of new privileges.²⁰ In addition, there has been doubt among authorities as to whether an accountant-client privilege would actually be in the public interest.²¹

Possible Sources of an Accountant-Client Privilege

Since there is no common law accountant-client privilege,²² any such privilege before the Internal Revenue Service must come from another source. Where there is no accountant-client privilege created by state statute, if relevant²³ information is to be treated as privileged

¹⁴ C. McCORMICK, EVIDENCE §§ 126-27 (2d ed. 1972) [hereinafter cited as McCORMICK].

¹⁵ 8 WIGMORE § 2290.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See generally Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, 66 MICH. L. REV. 1264, n.1 (1968).

¹⁹ E.g., *Lustman v. Commissioner*, 322 F.2d 253 (3d Cir. 1963); *Dorfman v. Roms*, 218 F. Supp. 905 (N.D. Ill. 1963). See also 8 WIGMORE § 2286.

²⁰ 8 WIGMORE § 2286.

²¹ It is the general policy of rules of evidence to give as much relevant information to the courts as possible. 8 WIGMORE § 2192.

²² See 8 WIGMORE § 2286.

²³ If information is not relevant the courts have no need for it and it is therefore inadmissible. McCORMICK § 77. In the federal courts, irrelevant information is precluded from discovery by FED. R. Civ. P. 26(b)(1).

such immunity must result from a right to privacy,²⁴ the attorney-client privilege, or a protection against self-incrimination.

In regard to the last of these, the question is one of whether a person may invoke the fifth amendment privilege against self-incrimination to keep relevant records and books from being viewed in an Internal Revenue Service hearing. The Court in *Couch v. United States* explains that papers and records are protected by the fifth amendment only if they are in the *possession* of the person invoking the privilege.²⁵ In *Couch* the Court states:

We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of a crime.²⁶

Moreover, the Court holds that a determination as to who has possession of the records must be made at the time the summons is served.²⁷ This view of protecting the individual from being forced to produce evidence rather than preventing the production of the evidence itself²⁸ is consistent with interpretations²⁹ given to *Boyd v. United States*,³⁰ in which it was held that private papers could be kept out of a criminal proceeding through the self-incrimination privilege.

By making the right against self-incrimination dependent upon possession, the Court in *Couch* was faced with the problem of whether there could be *constructive* possession.³¹ Unfortunately the Court

²⁴ 409 U.S. at 335-36. The Court discussed a constitutional right to privacy provided by the fourth and fifth amendments taken as a whole; however they determined that Mrs. Couch did not have a reasonable expectation of privacy.

²⁵ 409 U.S. at 327-36.

²⁶ 409 U.S. at 333.

²⁷ 409 U.S. at 329 n.9.

²⁸ 409 U.S. at 328-29. See note 10 *supra*.

²⁹ To require a person to deliver a document could violate his right against self-incrimination because the act of delivering the document would be a "statement" that it is the one requested in the subpoena, which would in fact be testimony. *McCORMICK* §§ 126-27. See also 8 *WIGMORE* § 2286. However, Mr. Justice Marshall in his dissent in *Couch* would view *Boyd v. United States*, 116 U.S. 616 (1886), as making the desire of the author to keep the document secret, rather than the necessity of his producing the document, the determinative factor.

³⁰ 116 U.S. 616 (1886).

³¹ See *United States v. Guterma*, 272 F.2d 344 (2d Cir. 1959), where turning records over at the inducement of the Government did not waive the privilege; *accord*, *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) (records had been turned over for custodial safekeeping). In *Couch* the members of the Court were not forced to decide how they would handle a case if records were turned over at the government's inducement or only for custodial safekeeping. However, Mr. Justice Brennan in his concurring opinion states that he would make the information privileged under these and similar circumstances. 409 U.S. at 337-38.

did not make any decision as to what constitutes possession:

Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact. But this is not the case before us.³²

Although the Court in *Couch* did not completely separate the right to privacy from the protection against self-incrimination, the majority did find that the right to privacy had been waived:

. . . [t]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's.³³

Mr. Justice Douglas³⁴ and Mr. Justice Marshall³⁵ in their dissenting opinions each found that records in the hands of the accountant should have been treated as privileged, because when records are held by one's accountant they have not been taken from an area in which one has a right to privacy.

Although there may still be legitimate arguments that the right to privacy should not have been deemed waived and that requiring production of records violated the fifth amendment,³⁶ the fact that seven members of the Court have agreed should help clarify some confusion that has existed regarding the accountant-client privilege. It has been generally agreed that communication between the accountant and client is not privileged in federal administrative hearings;³⁷ this case now establishes a guideline, not limited to administrative hearings, for determining whether a privilege exists as to accounting records. The issue will now be determined by whether the person desiring to invoke the privilege is in *possession* of the information in question.³⁸

³² 409 U.S. at 333-34.

³³ 409 U.S. at 335.

³⁴ 409 U.S. at 338.

³⁵ 409 U.S. at 344.

³⁶ See Tighe, *Accountant-Client Communications*, 12 TAX COUNSELOR'S Q. 1 (1968) where the law is interpreted as requiring a person with a lawful possessory interest to assert the fifth amendment privilege, although Tighe states it could be asserted for another. He develops his view by an analysis of cases in which the fifth amendment privilege has been asserted. *Id.* at 7-10. *Couch*, however, apparently does not require a lawful possessory interest and will clearly not allow one person to claim the privilege for another. *Couch* requires possession by the person who desires to claim privilege under the fifth amendment. 409 U.S. at 327-29.

³⁷ See, e.g., Annot., 38 A.L.R.2d 670 (1954).

³⁸ 409 U.S. at 330-36.

*Many States Have Statutes That Create
an Accountant-Client Privilege*

Couch v. United States has virtually eliminated the possibility of any claim for an accountant-client privilege based on the Constitution.³⁹ Moreover, since there was no accountant-client privilege at common law,⁴⁰ any further claim of this privilege must find its origin in state statutes. Presently 15 states and Puerto Rico have statutes which create an accountant-client privilege.⁴¹

These statutes can be divided into three groups. The first category is made up of statutes creating the accountant-client privilege with only one limitation—the information must have been obtained by the accountant in his *confidential capacity*.⁴² The wording in these statutes is very general, causing some confusion in interpretation. The intermediate group of statutes⁴³ explicitly imposes one or more of the following limitations: (1) the privilege is not applicable in criminal or bankruptcy proceedings; (2) it is limited to communications made to the accountant in the course of his employment; (3) the client may waive the privilege. The third category of statutes⁴⁴ adds a clause to the limitations in the statutes mentioned above, preventing assertion of the privilege against other parties who detrimentally relied on the accountant's audit.

Some of the statutes creating an accountant-client privilege are more restrictive than others; none, however, embodies all the restrictions that are present in the attorney-client privilege. These are: (1) that the information must have been conveyed with an expectation of privacy, (2) that cases of fraud are excepted, and (3) that the in-

³⁹ *Id.*

⁴⁰ See note 19 *supra*.

⁴¹ These jurisdictions and statutes are as follows: ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1972); COLO. REV. STAT. ANN. § 154-1-7(7) (1963); FLA. STAT. ANN. § 473.141 (Supp. 1973); GA. CODE ANN. § 84-216 (1970); ILL. REV. STAT. ch. 110½, § 51 (1969); IOWA CODE § 116.15 (1971); KY. REV. STAT. § 325.440 (Supp. 1972); LA. REV. STAT. ANN. § 37:85 (1964); MD. ANN. CODE art. 75A, § 20 (Supp. 1972); MICH. COMP. LAWS § 338.523 (Supp. 1972); MO. REV. STAT. § 326.151 (1965); NEV. REV. STAT. §§ 49.125-205 (1971); N.M. STAT. ANN. § 67-23-26 (1953); PA. STAT. ANN. tit. 63, § 911a (1968); P.R. LAWS ANN. tit. 20, § 790 (1961); TENN. CODE ANN. § 62-114 (1955).

⁴² See GA. CODE ANN. § 84-216 (1970); KY. REV. STAT. § 325.440 (Supp. 1972); N.M. STAT. ANN. § 67-23-26 (1953); P.R. LAWS ANN. tit. 20, § 790 (1961). Georgia's statute is the only one that has virtually no limitations.

⁴³ See ARIZ. REV. STAT. ANN. § 32-749 (Supp. 1972); COLO. REV. STAT. ANN. § 154-1-7(7) (1963); FLA. STAT. ANN. § 473.141 (Supp. 1973); IOWA CODE § 116.15 (1971); LA. REV. STAT. ANN. § 37:85 (1964); MD. ANN. CODE art. 75A, § 20 (Supp. 1972); MO. REV. STAT. § 326.151 (1965); NEV. REV. STAT. §§ 49.125-205 (1971); TENN. CODE ANN. § 62-114 (1955).

⁴⁴ See MICH. COMP. LAWS § 338.523 (Supp. 1972); PA. STAT. ANN. tit. 63, § 911a (1968).

formation must be relevant.⁴⁵ If statutes creating an accountant-client privilege are to be justified, these requirements need to be added. One writer states:

It is apparent that the existing accountant-client privilege statutes have been loosely formulated without attempting accurately to define the limited areas in which the privilege is actually justified.⁴⁶

Since these statutes have had limited application they have not received the criticism they deserve. This limited application has resulted primarily because state statutes creating accountant-client privileges have been held to be inapplicable in administrative hearings including Internal Revenue Service hearings.⁴⁷ Further, state statutes are not generally applied in federal criminal cases, including fraud cases initiated by the Internal Revenue Service.⁴⁸ For these reasons it is obvious that the effect of such statutes is very limited. Since an individual is not likely to be encouraged to give confidential information to his accountant by only a possibility of privilege, the primary advantages of an accountant-client privilege are reduced or eliminated by virtue of this limited application.⁴⁹

The choice of laws problem is confusing in theory⁵⁰ but generally not in application.⁵¹ It is clear that an Internal Revenue Service hearing would come under the Erie doctrine⁵² and the Federal Rules of Civil Procedure⁵³ and that state law governing privilege should be

⁴⁵ See *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (5th Cir. 1942). See generally Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, *supra* note 18, at 1275 n.46.

⁴⁶ Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, *supra* note 18, at 1277.

⁴⁷ For a complete discussion of the confusion that exists in applying state statutes before federal administrative agencies see Comment, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts*, 31 U. CHI. L. REV. 395 (1964).

⁴⁸ See *In re Bordon Co.*, 75 F. Supp. 857 (E.D. Ill. 1948), where the court held that the common law applied in federal criminal cases according to FED. R. CRIM. P. 26, and that there was no accountant-client privilege at common law. See also *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

⁴⁹ The purpose of the accountant-client privilege, like that of the attorney-client privilege, is to provide for full disclosure so that the attorney or accountant may give accurate advice and the best representation possible. 8 WIGMORE § 2291. See also Annot., 9 A.L.R.2d 797 (1950).

⁵⁰ See, e.g., Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1969); Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, *supra* note 18, at 1276.

⁵¹ For typical cases in this area see *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963), and *Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953), which refused to apply a state-created privilege.

⁵² *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁵³ FED. R. CIV. P. 43(a).

applied, but the courts have not treated such administrative hearings as civil cases.⁵⁴ The leading case in determining what law should be applied is *Falsone v. United States*.⁵⁵ In that case an accountant contended that a federal tax investigation was a civil proceeding and should be governed by the *Erie* doctrine and the Federal Rules of Civil Procedure, thereby requiring application of a Florida statute which provided for an accountant-client privilege. The court held, however, that an administrative proceeding (i.e., a tax investigation) differs from a civil proceeding so that the Federal Rules do not require application of the state-created privilege.⁵⁶

In a later case, *Baird v. Koener*,⁵⁷ the Ninth Circuit explained that a state-created privilege would apply in a contempt enforcement proceeding which the court distinguished from an agency investigation as in *Falsone*. Nevertheless, this distinction has not prevailed.⁵⁸ Confusion exists because later cases have not differentiated between types of proceeding, but have resorted to citing *Falsone* as holding that a state-created accountant-client privilege simply does not apply.⁵⁹ The fact that later cases cite *Falsone* and *Baird v. Koener* as being either supporting or failing to support the application of a state-created privilege is particularly unfortunate because it has precluded the courts from making a meaningful analysis of the question of when a state-created accountant-client privilege should apply.⁶⁰ In nearly all of the civil cases the courts have refused to apply a state-created accountant-client privilege.⁶¹ It is even more certain that a state-created account-

⁵⁴ See generally Comment, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts*, *supra* note 47. If a tax investigation was considered to be a civil proceeding, *Erie* and Fed. R. Civ. P. 43(a), which apply in civil proceedings but not in administrative hearings, would require the application of state substantive law (i.e., a statutorily created accountant-client privilege). However, the courts have not treated federal tax investigations as civil proceedings, so federal law, in which there is no accountant-client privilege, applies.

⁵⁵ 205 F.2d 734 (5th Cir. 1953).

⁵⁶ *Id.* at 737. See note 53 *supra*.

⁵⁷ 279 F.2d 623, 627-29 (9th Cir. 1960).

⁵⁸ E.g., Petersen, *supra* note 50, at 70-80; Comment, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts*, *supra* note 47; Comment, *Accountants, Privileged Communications, and Section 7602 of the Internal Revenue Code*, 10 ST. LOUIS U.L.J. 252 (1965).

⁵⁹ E.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962).

⁶⁰ See *FTC v. St. Regis Paper Co.*, 304 F.2d 731 (7th Cir. 1962), which distinguishes *Baird v. Koener* and *Falsone*. The court in *St. Regis Paper Co.* also discusses the rationale for allowing state-created privileges to apply in federal administrative hearings, and is thereby the exception rather than the rule.

⁶¹ See, e.g., *Sale v. United States*, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953); *Dorfman v. Rombs*, 218 F. Supp. 905 (N.D. Ill. 1963); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956). But see *Palmer v. Fisher*, 228 F.2d 603 (7th Cir.

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tant-client privilege will not apply in federal criminal cases.⁶²

The Efficacy of an Accountant-Client Privilege

As mentioned above, there is doubt among authorities as to whether an accountant-client privilege is in the public interest. Further, the accountant-client privilege was excluded from the proposed federal rules of evidence.⁶³ One reason for discrediting the accountant-client privilege is the belief that it is of little use to the honest citizen and will only benefit those who desire to cheat the government.⁶⁴ Another criticism of the privilege is that its application would encourage forum shopping.⁶⁵ If a plaintiff wanted to sue a person living in another state which had an accountant-client privilege and if he needed information held by that individual's accountant, he would sue in a state not having the privilege if possible. On the federal level this problem would exist primarily in a diversity action where state law would be applied.⁶⁶ That is, the problem would be increased if the state-created privilege were applied in the federal courts, because those wishing to take advantage of the privilege could move to a state having such a privilege, or possibly hire an accountant in such a state. Because a state-created privilege has not been applied in federal courts this criticism has been weakened.⁶⁷

The strongest policy reason for not allowing the privilege is that the public has the right to all relevant information⁶⁸ unless there is a substantial reason for withholding it. Courts do not approve of statutes which interfere with judicial access to relevant information.⁶⁹ This is particularly true in regard to statutory privileges that were not recognized at common law.⁷⁰

In considering the efficacy of an accountant-client privilege it is

(Footnote continued from preceding page)

1955), *cert. denied*, 351 U.S. 965 (1956), where a federal court allowed a state-created accountant-client privilege to stand.

⁶² See note 48 *supra*.

⁶³ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES DISTRICT COURTS AND MAGISTRATES § 5.01, 46 F.R.D. 243 (1969).

⁶⁴ See generally Leviton, *Is Paragraph 51, Section 27, Chapter 110½, of Illinois Revised Statutes, 1955, Entitled, "An Act to Regulate the Practice of Public Accounting and to Repel Certain Acts Therein Named" Constitutional?*, 37 CHI. B. RECORD 291 (1956).

⁶⁵ See, e.g., Petersen, *supra* note 50, at 79-80.

⁶⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁶⁷ See generally Comment, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C.L. REV. 419, 424-25 (1968).

⁶⁸ See note 23 *supra*.

⁶⁹ 8 WIGMORE § 2291.

⁷⁰ See *United States v. Bowman*, 358 F.2d 421 (3d Cir. 1966); see generally Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U.L. REV. 481, 542-47 (1954).

necessary to weigh all the relevant factors.⁷¹ Wigmore provides four fundamental conditions of social policy which should exist before a privilege is established:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community is to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.⁷²

Although all state statutes providing an accountant-client privilege do not require that communication be made to accountants in confidence in order to be privileged,⁷³ such a criterion could be established either by corrective legislation or judicial interpretation.

The second of Wigmore's requirements can also be met in the accountant-client relationship, at least where the accountant's work is similar to that of an attorney.⁷⁴ Sometimes the work is very similar, as, for example, when an accountant determines what information should be reported in the best interest of his client. However, there has been difficulty in determining when an accountant is performing services similar to those performed by an attorney.⁷⁵ If the privilege is to be applied only when this uncertain overlap exists, the benefits of the privilege would hardly encourage the full disclosure between the client and his accountant which is the purpose of having such a privilege.⁷⁶ Beyond giving advice in a capacity similar to an attorney's, if an accountant is to offer the full benefit of his skills the flow of information from the client to his accountant should be as complete as possible. That is, the accountant-client privilege may be important to a satisfactory client-professional relationship even where the accountant's duties are not similar to those of an attorney. The best approach to the privilege would seem to be to require that there be an intent that conversation remain confidential, and, if that intent exists, to assume that confidentiality was necessary to a satisfactory relationship.

⁷¹ See Comment, *Evidence—Privileged Communications—Accountant and Client*, *supra* note 67, which is devoted to an evaluation of the efficacy of the accountant-client privilege.

⁷² 8 WIGMORE § 2285 (emphasis added).

⁷³ See notes 41-44 *supra*.

⁷⁴ See generally Holtzman, *How Far Does the Accountant-Taxpayer Privilege Really Extend?*, 45 TAXES 654 (1967).

⁷⁵ See Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, *supra* note 18, at 1274.

⁷⁶ See note 49 *supra*.

This approach would create confidence in the application of the accountant-client privilege.

The third requisite is that the privilege must be important to the community. As taxes have become more complicated and technical and as financial records have become more important, the role and importance of the accountant has naturally increased. Mr. Justice Marshall in his dissenting opinion in *Couch* calls attention to the necessity of transferring records to an accountant by stating, "[t]hat a transfer is compelled by practical considerations if the author is to claim benefits available under the law."⁷⁷

The criterion that is the source of most of the criticism of the accountant-client privilege,⁷⁸ however, is the last one, which suggests weighing the benefits provided by the privilege against the benefits which would accrue to society by full disclosure. This criticism is based somewhat on the argument that the privilege would help only those interested in committing income tax fraud.⁷⁹ Nevertheless, as discussed above, full disclosure, which is the purpose of any professional-client privilege, is important to a satisfactory accountant-client relationship. To argue that the accountant-client privilege would only help those interested in committing fraud would be no more sound than an argument that the attorney-client privilege helps only criminals or potential criminals. Another argument concerns the burden on the Internal Revenue Service that would exist if it could not subpoena records.⁸⁰ This has been countered by the argument that in our adversary system it is typically the role of the government to develop facts on its own.⁸¹ As the need for full disclosure becomes greater⁸² and the importance of the services of the accountant becomes apparent to a larger section of society, state legislatures may receive increased pressure to pass laws creating an accountant-client privilege. Even so, there would not be a great change in practice and dependence on the privilege unless Congress created an accountant-client privilege or the federal courts recognized the state-created privileges in administrative hearings.⁸³ The better approach would be creation of a federal accountant-client privilege. Another possible method of cre-

⁷⁷ 409 U.S. at 633.

⁷⁸ See generally Comment, *Evidence—Privileged Communications—Accountant and Client*, *supra* note 67.

⁷⁹ *Id.*

⁸⁰ Petersen, *supra* note 50, at 98-99.

⁸¹ Fahey, *Testimonial Privilege of Accountants in Federal Tax Fraud Investigations*, 17 TAX. L. REV. 491, 509 (1962).

⁸² See generally Holtzman, *supra* note 74.

⁸³ But see text accompanying note 60 *supra*. For a discussion of whether an accountant-client privilege should exist see also Comment, *Evidence—Privileged Communications—Accountant and Client*, *supra* note 67.

ating a privilege is to view each claim for confidentiality of information as being privileged only if it could meet certain criteria such as those established by Wigmore.⁸⁴ Relationships would not be privileged, then, by specific inclusion in a statute, but by need for privilege on a case by case basis.⁸⁵ This method, however, would not encourage full disclosure because there would be no assurance of privilege, so it is probably better to continue to allow only those privileges specifically established by common law or statutes.

*When Can the Accountant-Client Privilege Squeeze
Under the "Attorney-Client Umbrella"?*

Since the Internal Revenue Service is not bound by an accountant-client privilege⁸⁶ and because there is not such a privilege at common law,⁸⁷ it is important to consider whether the accountant can squeeze under the "attorney-client umbrella"⁸⁸ and the situations in which an attorney acting as an accountant may become involved. Here, too, the advantage of having a privilege is partially undermined because the factual circumstances under which communication will be deemed to be privileged are uncertain.⁸⁹

Generally the information in the possession of an accountant will be privileged if a client goes to an attorney first, so that the accountant can be considered to be acting as an agent for the attorney.⁹⁰ In *Himmelfarb v. United States*,⁹¹ the Ninth Circuit refused to consider as privileged information in the possession of an accountant who was hired by the attorney. The court held that the accountant was not indispensable to the attorney-client relationship, so his presence waived any privilege.⁹² On the contrary, in *United States v. Kovel*,⁹³ the Second Circuit allowed information in the possession of an accountant working for an attorney to be privileged. Later, in *United States v.*

⁸⁴ 8 WIGMORE § 2285.

⁸⁵ See Note, *Privileged Communications: A Case by Case Approach*, 23 ME. L. REV. 443 (1971).

⁸⁶ See text accompanying notes 39-61 *supra*.

⁸⁷ See note 19 *supra*.

⁸⁸ This terminology is borrowed from Tigie, *supra* note 36, at 4. For cases in this area see, e.g., *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 1967 (1965); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *Garipey v. United States*, 189 F.2d 459 (6th Cir. 1951); *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

⁸⁹ See generally Lore & Goldfein, *Accountant-Client Privilege: Where Does it Exist and How Far Does it Extend?*, 30 J. TAXATION 308 (1969).

⁹⁰ E.g., Tigie, *supra* note 36, at 4.

⁹¹ 175 F.2d 924 (9th Cir. 1949).

⁹² *Id.*

⁹³ 296 F.2d 918 (2d Cir. 1961).

Judson,⁹⁴ the Ninth Circuit joined the majority view and treated information in the hands of an accountant, employed by an attorney, as privileged. It should also be noted that if the court determines that information in the hands of an accountant is privileged, then that protection will also extend to workpapers and reports of the accountant.⁹⁵ It has been said that, as a general rule, the accountant comes under the attorney-client privilege if the client goes to the attorney first,⁹⁶ but it is important to note a restriction. A privilege will not be deemed to exist beyond the purpose of giving legal advice.⁹⁷ The problem with the present system is that the factual circumstances under which the accountant comes within the attorney-client privilege are not consistently or clearly defined.⁹⁸ It is not completely clear what the outcome would be if the accountant sent the client to an attorney after several meetings between the accountant and client. The courts also have not decided how close the working relationship between the accountant and attorney must remain. In these borderline cases the client cannot have faith in confidentiality, thereby making any privilege of little value.⁹⁹ *Couch* has not helped define limits in this area because in *Couch* the client had gone to the accountant for several years before consulting an attorney.

When an attorney acts as an accountant, information will not come within the purview of the attorney-client privilege.¹⁰⁰ Once again a problem exists in determining when the attorney is acting as an accountant. In an early case, *In re Fisher*,¹⁰¹ the court compelled production of records, stating that the service (an audit) rendered by the attorney was characteristically performed by an accountant, so the attorney-client privilege was not allowed. A later case, *Olender v. United States*,¹⁰² held that a tax return is also typically the work of an accountant, but this view is disputed.¹⁰³ The better view is that

⁹⁴ 322 F.2d 460 (9th Cir. 1963).

⁹⁵ *Id.* at 466.

⁹⁶ See, e.g., *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *Bauer v. Orser*, 258 F. Supp. 338 (D.N.D. 1966). See note 88 *supra*. In *Reisman v. Caplin*, 375 U.S. 440 (1964), the Court indicated that the attorney-client privilege would at least include an accountant hired by an attorney.

⁹⁷ *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954), *cert. denied*, 352 U.S. 982 (1957).

⁹⁸ See Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant—Client Privilege Statutes*, *supra* note 18, at 1274.

⁹⁹ See note 49 *supra*.

¹⁰⁰ See, e.g., *Lore & Goldfein*, *supra* note 95.

¹⁰¹ 51 F.2d 424 (S.D.N.Y. 1931).

¹⁰² 210 F.2d 795, 806 (9th Cir. 1954).

¹⁰³ See generally *Petersen*, *supra* note 50.

tax returns are within the typical province of legal service as the court held in *Colton v. United States*.¹⁰⁴ In these cases the courts have evaluated the type of work that the attorney was performing.¹⁰⁵ This type of evaluation leads to uncertainty which undermines the purpose of having an attorney-client privilege.¹⁰⁶ The best approach would seem to be for the courts to create a presumption depending on whether the person holds himself out as an attorney or an accountant.¹⁰⁷ This would then be consistent with a person's expectations as to the existence of a privilege and would encourage full disclosure in appropriate circumstances.

Conclusion

Does *Couch v. United States* help relieve the dilemma of the accountant or the attorney acting as an accountant in determining what communications are privileged? Although the law is not clear it is possible to note some guidelines, particularly in regard to what an accountant can do to prevent denial of a claim of privilege, to assure the client of a right against self-incrimination, and to assure him of his right to privacy, where possible.

The primary importance of *Couch* is that the Court makes it clear that it will give all possible consideration to *possession* when considering constitutional rights that could prevent disclosure. If Mrs. Couch had been in possession of the records when the summons was served, she would not have been required to produce them.¹⁰⁸ This tells the accountant that he should not retain any documents that he can avoid keeping. When the accountant is finished with records he should return them to the client as completely and quickly as possible.

Next, an accountant and client should not rely on a state-created privilege when dealing with federal tax matters, because it is unlikely that the state law will apply. This may not be logical or even the best approach, but the courts have refused to apply state-created accountant-client privileges in federal administrative proceedings. This obviously makes the state-created privileges of little value since much

¹⁰⁴ 306 F.2d 633 (2d Cir. 1962). But see *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir. 1966), where the court said an attorney who was filling out tax returns was acting as a "mere scrivener." For a criticism of *Canaday*, see Comment, *The Attorney-Client Privilege in the Preparation of Tax Returns*, 33 Mo. L. REV. 122 (1968).

¹⁰⁵ See also *United States v. Chin Lim Mow*, 12 F.R.D. 433 (N.D. Cal. 1952).

¹⁰⁶ See note 49 *supra*.

¹⁰⁷ For a similar view, see Petersen, *supra* note 50.

¹⁰⁸ 409 U.S. at 327-29.

of the accountant-client relationship is devoted to completing records required by the government through its administrative agencies.

Finally, if it appears to an accountant that a client might have conflicts with the government, that client should be sent to an attorney as soon as possible. This should create a probability that appropriate information later conveyed to the accountant would come under the attorney-client privilege. The attorney acting as an accountant should remember that information conveyed to him by a client, under these circumstances, will not be protected by the attorney-client privilege. For accounting information to be privileged, other than by the attorney-client privilege, it should be remembered that *possession* is the determinative factor.

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